88-1869

Supreme Court, U.S.
FILED
MAY 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GLADYS AYALA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether IRS Form 4789 which was promulgated to implement the Federal Currency Reporting Act is so ambiguous in its directions as to be unconstitutionally vague in violation of the due process clause?

2. Whether the rule of lenity prohibits petitioner's conviction when that conviction is based upon violation of the ambiguous reporting requirements contained in IRS Form 4789?

3. Whether Title 31 U.S.C. §5313 imposes a duty upon petitioner to ensure that currency transaction reports are accurately filled out and filed solely because she is a bank officer?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

GLADYS AYALA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

RICHARD H. KIRSCHNER, on behalf of petitioner, GLADYS AYALA, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on March 17, 1989.

OPINIONS BELOW

An unpublished opinion in the above-entitled case was rendered by the Circuit Court (Appendix A herein) (CA No. 87-5192). The District Court filed a written memorandum opinion on June 23, 1987 (Appendix B herein).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to United States Constitution
31 U.S.C. §5313, 5322(b)
18 U.S.C. §1001

STATEMENT OF FACTS

Petitioner Gladys Ayala was a bank officer at the South Santa Ana Branch of the Bank of America. In her capacity as assistant bank manager, petitioner serviced the predominantly Spanish-speaking clientele who were often illiterate and needed help conducting routine banking. The bank's policy during the period of time in question was that currency transaction reports ("CTRs") were filled out by whomever took the deposit. The Bank of America branch manager, petitioner's supervisor, testified at trial that petitioner as assistant manager would have no duty to fill out the requisite CTR on a cash transaction (RT 277-278). A Bank of America Audit Department investigator testified at trial that there were no procedures at the Santa Ana bank branch outlining who should sign currency transaction reports. Additionally, the Bank of America manual in effect at that time did not specify which bank personnel were responsible for satisfying the CTR filing requirements (RT 153, 163-164, 159).

Petitioner was indicted and convicted for her involvement in the banking activities of two branch customers, Waldyr Pizzotti and Luis Gamboa. Petitioner opened a

bank account at her bank for Pizzotti, a Brazilian, who transferred his account from another branch where he had attained VIP customer status. One day Pizzotti approached petitioner with a signed signature card in order that she open an account in the name of his aunt, "Ada Bottesini." Pizzotti had a power of attorney authorizing him to represent Ada Bottesini's interests and to sign documents on her behalf (RT 310).

Both codefendants Gamboa and Pizzotti testified at petitioner's trial that they conducted banking activities at the Santa Ana Branch of the Bank of America in a deceptive manner to circumvent the currency reporting requirements and the IRS. They testified that petitioner knew of their activity and facilitated their banking acts.

While petitioner was not the bank officer who signed the CTRs in question that indicated "Ada Bottesini" conducted the banking transactions instead of the actual individuals present in the bank, the government theorized that petitioner "caused" the Bank of America to file materially false CTRs in violation of 18 U.S.C. §1001, 31 U.S.C. §§5313, 5322(b).

REASONS FOR GRANTING THE WRIT

A. THE ISSUES PRESENTED IN THIS CASE ARE IMPORTANT ONES UPON WHICH GUIDANCE FROM THIS COURT IS NECESSARY

The writ should be granted in this case because, as required by Rule 17.1(c) of the Rules of the Supreme Court of the United States, "an important question of federal law which has not been, but should be settled by this Court" is involved. There is confusion among the circuits regarding exactly who bears the statutory burden

for reporting currency transactions as required by Title 31 U.S.C. §5313. This confusion is fueled by the ambiguous wording of certain implementing regulations and specifically the IRS reporting forms used. Since such ambiguity and confusion exists, it can and will ensnare a citizen such as petitioner who cannot discern exactly what conduct is proscribed. *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983). Such lack of clarity in the governing statutory law results in deprivation of due process of law. If the statutory provisions are constitutionally ambiguous, as petitioner contends, the burden of such ambiguity must be construed against the government. As this Court described this constitutional principle in *Huddleston v. United States*, 415 U.S. 814, 831 (1974),

> ". . . ambiguity concerning the criminal statutes should be resolved in favor of lenity. [Citations omitted.] This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property. *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820); *United States v. Bass*, 404 U.S. at 348." *See also, Williams v. United States*, 458 U.S. 279 at 290 (1982).

In *McNally v. United States*, 107 S.Ct. 2875 (1987), this Court reviewed the mail fraud statute (18 U.S.C. §1341) and held that defendant's arguably fraudulent conduct was not proscribed by the statute at issue. In support of its reasoning, the Court observed:

> "[A]s the Court said in a mail fraud case years ago, 'there are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.' *Fasulo v. United States*, 272 U.S. 620, 629, 47

S.Ct. 200, 202, 71 L.Ed. 443 (1926)." *McNally, supra*, at 2881.

1. THE CURRENCY REPORTING ACT AND IMPLEMENTING REGULATIONS ARE AMBIGUOUS REGARDING DUTY TO REPORT AND MANNER OF COMPLIANCE.

Petitioner contends that IRS Form 4789 is ambiguous and that the convictions achieved by the government in this case were premised upon the theory that IRS Form 4789 must be filled out describing the "true source" of deposited funds and not the name of the account holder as was done in this case. The Ninth Circuit in its opinion dismissed summarily petitioner's argument that IRS Form 4789 was ambiguous by restricting its analysis to Part I of the form instead of looking at the form as a whole (Appendix A, p. 2). Petitioner asserts this is an erroneous interpretation of the form. The Ninth Circuit previously had determined that Part II of the form was unconstitutionally vague. *See United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987). Petitioner asserts that Part I and Part II are interrelated as Part II need not be completed if the information in Part I is applicable. Thus this Court should give guidance regarding the ambiguous nature of this reporting form.

Petitioner also contends that the duty of a bank officer to ensure that the financial institution prepares accurate CTRs is not specified with due process clarity. Petitioner urges that this Court clarify the responsibility and culpability of bank personnel in relation to preparation and filing of CTRs. While the Ninth Circuit has decisively rejected expansive readings of §5313 as the statute relates to depositors, the Circuit has not directly

dealt with all categories of bank employees. Even the District Court and the Circuit Court in the instant case founded their decisions upon case authority from the Fifth, Eighth and Eleventh Circuit Courts. It is noteworthy that these circuits do not interpret §5313 in the same manner as does the Ninth Circuit in relationship to depositors and "structured" currency transactions. *See United States v. Varbel*, 780 F.2d 758 at 763 (9th Cir. 1986). In *Varbel*, the Ninth Circuit made it clear "only financial institutions are required to file reports." (*Varbel, supra*, at 762). *See also United States v. Robinson*, 832 F.2d 1165 (9th Cir. 1987). This Court can resolve the question of whether status as a bank officer, *per se* or actual control and responsibility for the currency reporting procedures at the banking institution should determine duty to report and corresponding criminal culpability for failing to report currency transactions. *See United States v. Polychron*, 841 F.2d 833 (8th Cir. 1988).

B. WITHOUT A CLEAR DETERMINATION AS TO THE DUTY TO REPORT THAT FALLS UPON A BANK OFFICER, PETITIONER CANNOT BE GUILTY OF CAUSING A FALSE CTR TO BE FILED.

The Ninth Circuit Court of Appeals erroneously concluded in its memorandum opinion that "[petitioner] knowingly participated in a deceptive scheme and willfully caused her employer to file a materially false CTR." (Appendix A, p. 3) The Ninth Circuit reached this conclusion through mischaracterizing a critical fact regarding the "Ada Bottesini" account. As the trial evidence demonstrated, codefendant and bank VIP Customer Pizzotti had a power of attorney for Ada

Bottesini. Thus the Circuit Court erred when it concluded Pizzotti's signature for Ada Bottesini was a forgery. The evidence adduced at trial merely established that Pizzotti himself was transacting banking business through the Ada Bottesini account he had opened on her behalf and petitioner was aware that Ada Bottesini was not personally present conducting these currency transactions. If the wording of the IRS Form 4789 as to how it is filled out is ambiguous, it was the form itself, and not petitioner who "caused the bank to file a materially false CTR." Moreover, the trial evidence failed to establish how petitioner caused the particular CTR to be filed in this allegedly deceptive manner. The Circuit Court relied erroneously upon *United States v. Causey*, 835 F.2d 1289 (9th Cir. 1987) in which the defendant-tax protester actively participated in a scheme whereby his clients would prepare tax returns with his instructions claiming complete refunds for all withheld wages. The clear distinction between petitioner's case and *Causey* is that no ambiguity existed as to the duty to file and nature of the information to be included in the tax forms. In the instant petitioner's case no causal connection was demonstrated between petitioner's actions or omissions and the actual CTRs that were filed by the very disorganized banking institution where petitioner worked. The relationship of duty and causation is critical to the analysis of the currency reporting act. When circuit courts have held bank officers culpable under these governing statutes, these elements have been clearly established.

In *United States v. Hayes*, 827 F.2d 469 (9th Cir. 1987), bank Vice President Gonsalves pled guilty and testified as a government witness to his knowing involvement in the failure to file CTRs regarding cash deposits for over $10,000 that Gonsalves received directly from defendant Hayes. Thus, bank Vice President Gonsalves received the money, divided the

deposits, made out the checks, and delivered the checks to his codefendant at the store. Given the banker's exclusive contact with the deposit activity, it is reasonable that the failure to file a CTR was the banker's exclusive duty on behalf of the financial institution. In *Varbel, supra*, the Ninth Circuit cited the Fifth Circuit case of *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979), and distinguished it; petitioner maintains that a careful review of the facts of *Thompson* demonstrate that it is distinguishable again. Defendant Thompson was Chairman of the Board of the bank; he admitted that he had structured the loan transaction to avoid CTR requirements; moreover, the commercial teller testified that she had relied upon Thompson's authority as Chairman of the Board in failing to file the currency reports, and Thompson personally received the cash from the teller. In analyzing the *Thompson* case, the Fifth Circuit in *United States v. Tobon-Builes*, 706 F.2d 1092 (1983), emphasized the importance of the teller's reliance upon Thompson's authority because ". . . the *Thompson* Court made clear that the defendant's liability, like Tobon's liability here, stemmed not from his duty to file a currency report but rather from his causing the financial institution to fail to file the required report. *Id.* at 1201." *Tobon-Builes, supra*, at 1099. In *United States v. Sans*, 731 F.2d 1521 (1st Cir. 1984), the defendant-bank vice president brought his co-conspirator Cohen to the bank head teller, told her to exchange the bills Cohen had, and that no CTR needed to be filed for that transaction. The evidence received from the bank teller and secretary demonstrated that the bank vice president was involved in the directions each received regarding nonfiling of the CTR related to the suspect transaction. *Sans, supra*, at 1528. Moreover, the defendant in *Sans* did not challenge his culpability as a bank employee but challenged whether the transaction occurred at all. So, too, in *United States v. Puerto*, 730

F.2d 627 (11th Cir. 1984), the issue of bank employee status was not raised.

In the instant case, the duty to report currency transactions has been assigned to the "financial institution." Neither the Bank of America nor the Secretary of the Treasury established a procedure to determine who within the financial institution was to perform this duty. In *Varbel, supra*, the Ninth Circuit cautioned that restraint is appropriate where the currency law or implementing regulations promulgated by the Secretary are ambiguous or silent because the duty to report currency transactions cannot be imposed by implication. *Varbel, supra*, at 763. Such restraint was not shown regarding petitioner because neither her statutory duty nor evidence showing how petitioner caused her employer to file the questioned CTRs was presented below.

CONCLUSION

The present case presents important issues for resolution by this Court regarding the clarity of the currency reporting act and the duty to comply with its provisions. Petitioner respectfully urges this Court to grant her Petition for Writ of Certiorari in order that the uncertainty regarding the reporting requirements may be dispelled.

Respectfully submitted,

RICHARD H. KIRSCHNER

Attorney for Petitioner
GLADYS AYALA

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 17 1989
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.
GLADYS AYALA,
Defendant-Appellant.

CA No. 87-5192
DC No.
CR-86-747-PAR-2

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
Honorable Pamela A. Rymer,
District Judge, Presiding
Submitted[2] March 6, 1989
Pasadena, California

Before: SNEED, FARRIS, PREGERSON,
Circuit Judges.

Gladys Ayala appeals her convictions for (1) conspiracy to defraud and conceal material information from the

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

[2] The panel unanimously finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

United States, in violation of 18 U.S.C. § 371; (2) willfully aiding and abetting or causing her employer financial institution to file a materially false Currency Transaction Report, in violation of 18 U.S.C. § 2 and 31 U.S.C. §§ 5313 and 5322(b); and (3) willfully aiding and abetting or causing her employer to file a materially false CTR in violation of 18 U.S.C. § 1001.

Ayala argues that the trial court should have granted her motion for judgment of acquittal on all counts because her employer did not file a materially false CTR. She argues that, to the extent Part I of IRS Form 4789 requires banks to list the name of the person who physically conducted a transaction, the CTR filing requirements are unconstitutionally vague. IRS Form 4789, Part I requires the reporting institution to list the name of the "individual who conducted this transaction." Ayala's employer listed the name of a person who was not present at the bank, and who was only involved in the transaction to the extent that her nephew did business under her forged name. As applied to this case, the requirements of IRS Form 4789 are not unconstitutionally vague.

Ayala's reliance on *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987) is misplaced. In *Murphy*, we affirmed the dismissal of an indictment under the Currency Reporting Act, on the ground that an ambiguity in Part II of IRS Form 4789 rendered the reporting requirements unconstitutionally vague. By contrast, the only false statement mentioned in Ayala's indictment appeared on Part I of IRS Form 4789. Part II was left blank. There is no ambiguity in Part I as applied to these facts.

Ayala argues that even if her bank filed a materially false CTR, she cannot be held criminally liable because she did not participate personally in the preparation of the CTR, and had no duty to assure that it was accurately prepared. Those facts do not require reversal. There

was evidence in the record from which a jury could conclude that Ayala knowingly participated in a deceptive scheme and willfully caused her employer to file a materially false CTR. *See, e.g., United States v. Giles*, 300 U.S. 41 (1937); *United States v. Causey*, 835 F.2d 1289 (9th Cir. 1987). Such evidence is sufficient to support a conviction under any of the statutes named in the indictment. *See United States v. Hayes*, 827 F.2d 469, 472-73 (9th Cir. 1987); *United States v. Thompson*, 603 F.2d 1200, 1202-04 (5th Cir. 1979); *United States v. Polychron*, 841 F.2d 833, 836 (8th Cir.), *cert. denied*, 109 S. Ct. 135 (1988).

We understand but reject Ayala's other assignments of error. Her counsel was not incompetent and there was no error in the jury instructions. The amendment of the indictment does not constitute grounds for reversal.

AFFIRMED.

APPENDIX B

FILED
JUN 23 1987
Clerk, U.S. District Court
Central District of California
By /s/ SAR Deputy

ENTERED
JUL 2 1987
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALILFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
GLADYS AYALA,
Defendant.

NO. CR 86-747 PAR

MEMORANDUM OF DECISION AND ORDER

Defendant Gladys Ayala brings motions for judgment of acquittal and new trial pursuant to Federal Rules of Criminal Procedure 29(c) and 33, respectively. Ayala was convicted on December 8, 1986 by a jury for violations of federal currency reporting laws, conspiracy, and concealing material facts from the United States. On December 17, 1987 defendant's then-counsel, William A. Dougherty, and counsel for the government stipulated that the time for filing defendant's motion for new trial is enlarged until January 6, 1987. A court order on that stipulation was entered December 18, 1986. A motion

for new trial under Rule 33 was filed on January 5, 1987 by prior counsel. The motion was scheduled to be heard on January 26, 1987 concurrently with Ayala's sentencing hearing. Both hearings were subsequently continued numerous times to allow Ayala to obtain new counsel and to allow new counsel sufficient time to prepare supplemental papers. Supplemental papers were filed on April 4, 1987 and the Government responded on May 15. The matter was continued again to June 9 to allow defendant time to reply to the Government's opposition. Defendant filed her reply brief on June 4, 1987.

A. TIMELINESS OF THE MOTION

Both Federal Rules of Criminal Procedure 29(c) and 33 provide for the bringing of a motion for judgment of acquittal and/or new trial within seven days of the date of conviction. Both Rules contain virtually identical language with respect to time limits. Rule 29(c) states:

> [A] motion for judgment of acquittal may be made or renewed within seven days after the jury is discharged or within such further time as the court may fix during the 7-day period.

Rule 33 similarly provides:

> A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment . . . A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Under Federal Rule of Criminal Procedure 45(b) the Court may not extend the time for taking any action under Rules 29 or 33. *State of Arizona v. Manypenny*, 672 F.2d 761, 764 (9th Cir. 1982). Rules 33 and 29 are

precise and the "power of the courts . . . to consider such motions . . . must be confined." *United States v. Robinson*, 361 U.S. 220, 225-26, 80 S. Ct. 282, 286, 4 L. Ed. 2d 259, 263 (1960).

Defendant has asserted as one of her grounds for relief the discovery of new evidence; hence, under Rule 33, her motion for a new trial *based on the newly discovered evidence* could be timeously filed up to two years from the time of conviction. However, that part of her motion based on grounds other than newly discovered evidence and brought more than seven days after conviction would be barred on jurisdictional grounds under both Rule 29(c) and Rule 33 if not filed within the limits provided. *U.S. v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982); *United States v. Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir. 1979). *See also United States v. Hazeem*, 679 F.2d 770, 774 (9th Cir. 1982) (motion for new trial denied where defendant filed it 30 days after conviction and contained no grounds based on newly discovered evidence); *U.S. v. Reese*, 561 F.2d 894 (D.C. Cir. 1977) (if made more than seven days after verdict, a new trial motion may be based only on newly discovered evidence).

Both Rules 29(c) and 33 make clear that an exception to the filing time limit applies to situations where the defendant obtains within seven days of the date of conviction a Court order extending the time for filing such motions. *See* Advisory Committee Note to the 1966 Amendment to Rule 29(c) (stating that "the court is authorized to extend the time as is provided for motion for new trial (Rule 33) and in arrest of judgment (Rule 34)"). In this case, Ayala was convicted on December 8, 1986; thus, the deadline for her either to file a Rule 29(c) or 33 motion *or* request an extension of time to file was December 15, 1986. It is undisputed that defendant did not file her motion for new trial until January 5, 1987. Moreover, defendant did not file any papers

explictly [*sic*] asking for relief in the form of a judgment of acquittal until April 4, 1987.[1]

Defendant's first request for an enlargment [*sic*] of time was filed on December *17*, 1986. Even though the Court approved the extension and filed on December 18, 1986 an order enlarging time for bringing defendant's motion for new trial, that act, together with subsequent extensions, would be without jurisdiction, unless the Rules operate to extend defendant's time because of an intervening Saturday and Sunday. *Lujan v. United States*, 204 F.2d 171 (10th Cir. 1953). *See also U.S. v. Fontanez*, 628 F.2d 687 (1st Cir. 1980) (affirming district court's rescission of order granting motion for new trial when it discovered the motion had been filed one day after the expiration of the seven-day filing rule); *Hazeem*, 659 F.2d at 774; *United States v. Johnson*, 487 F.2d 1318 (5th Cir. 1974) (trial court lacked jurisdiction to consider motion for judgment of acquittal which was not timely filed); *United States v. Bevan*, 546 F.2d 1316, 1319 n.1 (8th Cir. 1976); *United States v. Newman*, 456 F.2d 668 (3rd Cir. 1972); *Rowlette v. United States*, 392 F.2d 437, 439 (10th Cir. 1968). *See also United States v. Ferguson*, 460 F. Supp. 1, 5 (E.D. Tenn. 1977) (untimeliness of Rule 29(c) motion deprived court of jurisdiction to consider it); *United States v. Mills*, 54 F.R.D. 497, 498 (W.D. Tenn. 1972) (filing of Rule 33 and Rule 29 motions 12 days after conviction was untimely and deprived court of jurisdiction to consider them); *United States v. Godoy*, 687 F.2d 84 (9th Cir. 1982); *Drown v. United States*, 198 F.2d 999 (9th Cir.

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[1] Although defendant's motion was originally brought pursuant to Rule 33 exclusively, it is not improper for the Court concurrently to consider arguments that might justify entering a verdict of acquittal. *See United States v. Mann*, 557 F.2d 1211 (5th Cir. 1977); *United States v. Gibbons*, 437 F. Supp. 650 (E.D. Pa. 1977) (considering motion for new trial also as one for judgment of acquittal).

1952); *United States v. Homer*, 411 F. Supp. 972 (W.D. Pa. 1976).

Defendant urges the Court to interpret the time limit provisions of Rules 29(c) and 33 liberally in conjunction with various civil rules of procedure. Specifically, defendant argues that the Rule 33 and 29 time limits could be enlarged by computing them in accordance with Federal Rule of Civil Procedure 6(a), which provides that "[w]hen the period of time prescribed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." *See also* Local Rule 7.3.1. Applying this rule to the facts at hand, defendant points out that if Saturday, December 13, 1986, and Sunday, December 14, 1986 were to be excluded from the time computation, then defendant's filing of her Rule 33 motion on December 17 occurred exactly seven days after the date the jury returned its verdict. Defendant also points to Local Rule 7.3.2, which allows the time for required filing of a document or paper in a civil case to be enlarged by order of Court "before or *after* the expiration of the time provided unless contrary to statute or the F.R.Civ.P." Local Rule 7.3.2 (emphasis added).

Incorporating the civil rules for computation of time into the time provisions for Rules 29(c) and 33 is inappropriate. *Cf. United States v. Homer*, 411 F. Supp. at 975 (declining to apply a civil state case standing for the proposition that procedural defects can be waived to a defendant's untimely Rule 29, 33 motion and stating "[i]t was not a criminal case and being a state case, this court is not bound by it in construing federal criminal rules which in no uncertain terms deny the court power to consider these motions or to extend the time after the lapse of seven days"). Application of civil computation rules is particularly awkward (and unnecessary) since Federal Rule of Criminal Procedure 45 already provides for computation of time in criminal matters.

Applying the criminal time computation rules, however, does not change the result defendant seeks from utilizing the civil rules. Rule 45(a), after being amended in 1985, now provides for the same exclusion of Saturdays and Sundays in criminal matters having a time limit of less than 11 days, as is provided for under the newly amended Federal Rule of Civil Procedure 6(a). (*See* Notes of the Advisory Committee on Rule 45: "This rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure . . ." *See also* Notes to 1985 Amendment: "The Rule is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods in less than 11 days."). Moreover, Rule 45 has been applied to extend the seven-day time period for bringing a Motion for Acquittal and Motion for New Trial. *See United States v. Turner*, 490 F. Supp. 583, 596 (E.D. Mich. 1979) (Rule 33 and 29 motions were timely filed on eighth day after conviction since seventh day was December 25, which is excluded as a "legal holiday" under Rule 45); *cf. United States v. Simon*, 225 F.2d 260 (3rd Cir. 1955) (motion for new trial made seven days after verdict was timely under unamended rule prescribing 5-day limit when the seven days included a Sunday and a state holiday).

In 1966, Rule 29(c) was amended increasing the time limit previously set at 5 days to the current limit of 7 days. The Advisory Committee noted the reason:

> The time in which the motion may be made has been changed to 7 days in accordance with the amendment to Rule 45(a) which by excluding Saturday from the days to be counted when the period of time is less than 7 days would make 7 days the normal time for a motion required to be made in 5 days.

Rule 33 was similarly amended in 1966 for precisely the same reason. *See* Notes of Advisory Committee on Rule

33, 1966 Amendment. Thus, the intention in amending the time limit of Rule 29 and 33 was to guarantee defendants seven days (and five working days) in which to prepare and file their post-trial motions. In 1966, when these amendments were made, Rule 45(a)'s provision excluding Saturdays and Sundays only pertained to Rules prescribing time limits of less than 7 days; thus, Rules 29 and 33 were unaffected by Rule 45(a). In 1985, however, Rule 45(a) was amended again to expand the number of rules covered by its exclusion provisions to any that prescribed time limits of less than 11 days.[2]

Thus, the seven-day limits contained in Rules 29(c) and 33 are now subject to the computation methods of Rule 45(a). Accordingly, Ayala's request for an extension to file her motion was timely filed.

B. STANDARDS OF REVIEW

Under Federal Rule of Criminal Procedure 33 a defendant is entitled to a grant of a new trial if the court finds that such a remedy is "required in the interest of justice." Rule 33 recognizes that the trial court has broad powers to grant a new trial if for any reason it concludes that the trial has resulted in a miscarriage of justice. 3 Wright and Miller, *Federal Practice and Procedure* § 551. "The Court has discretion in passing on the motion, but it should hold in mind the harmless error provisions of Rule 52, and refuse to grant a new trial if the substantial rights of the defendant were not affected." *Id; See U.S. v. Indelicato*, 611 F.2d 376 (5th Cir. 1979) (remedy of new trial is sparingly used, and then only where there would be a miscarriage of justice

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[2] Specifically, the Committee was concerned that parties bringing motions under rules prescribing 10-day limits could have as few as 5 working days to prepare their motions. (*See* Notes of Advisory Committee on Rule 45, 1985 Amendment.)

and where the evidence preponderates heavily against the verdict). The question to be asked is whether a rational jury could have decided that the accused was guilty beyond a reasonable doubt. *U.S. v. Hall*, 552 F.2d 273 (9th Cir. 1977).

Under Rule 29, the court may order the entry of judgment of acquittal of one or more of the offenses charged in the indictment if the evidence is insufficient to sustain a conviction of such offense or offenses. Fed. R. Crim. P. 29(a). The standard by which the court is to be guided in passing on a motion for judgment of acquittal is the same regardless of whether the motion is at the close of the government's evidence or at the close of all the evidence or after discharge of the jury. 2 Wright and Miller, § 467. All reasonable inferences are to be resolved in favor of the prosecution and the court is required to view evidence in light more favorable to the government with respect to each element of the offense. *United States v. Mariani*, 725 F.2d 862 (2nd Cir. 1984).

C. VAGUENESS CHALLENGE AND THE DUTY TO DISCLOSE TRUE SOURCE OF MONEY

Defendant's primary argument in bringing this motion is that she was convicted for noncriminal activity in that under recent Ninth Circuit rulings, especially *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987), there is no criminal liability for failing to disclose the true source of money on a Currency Transaction Report ("CTR"). Defendant urges that the charges of conspiracy to cause the financial institution to file materially false CTRs in violation of 31 U.S.C. §§ 5313, 5322, to defraud the United States by impeding the IRS and Department of Treasury in collection of data of currency transactions in excess of $10,000, and to cause the

falsification of material facts in violation of 18 U.S.C. § 1001 are all premised upon a now discredited theory that IRS Form 4789 must be filled out describing the "true source" of deposited funds (as opposed to merely stating the name of the account holder). Defendant cites cases interpreting the Currency Reporting Act, 31 U.S.C. 5313, and suggests that they stand for the proposition that the statute is too vague to support criminal prosecution of someone who is not clearly charged with the responsibility of filing a CTR. *See Murphy*, 809 F.2d at 1431; *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432, 1436 (9th Cir. 1986). In analyzing these cases (and others) defendant stresses the factor of the "status" of the accused: "defendant does not question whether the *act* is a crime . . . if committed by *anyone* but, rather, whether Ayala is a *person* who by her status can violate this law." (Def's Reply Brief at p. 7).

It is undisputed that the Reporting Act, 31 U.S.C. § 5313 *et seq.*, is not self-executing and therefore an individual cannot be prosecuted unless he/she violates an implementing regulation. *United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States v. Murphy*, 809 F.2d 1427, 1430 (9th Cir. 1987). In the instant case, at least two important regulations are implicated by defendant Ayala's conduct — Title 31 C.F.R. section 103.22 (requiring financial institutions to file transaction reports) and section 103.26 (requiring financial institutions to record identities of those who make transactions covered in section 103.22). Specifically, section 103.26 provides:

> Before effecting any transaction with respect to which a report is required under paragraph (a) of § 103.22, a financial institution shall verify and record the name and address of the individual presenting a transaction, as well as record the identity, account numer, and the social

> security or taxpayer identification number, if any, of any person or entity for whose or which account such transaction is to be effected. Verification of the identity of an individual who indicates that he is an alien or is not a resident of the United States must be made by passport, alien identification card or other official document evidencing nationality or residence. Verification of identity in any other case may be by examination of a document normally acceptable as a means of identification when cashing checks, for example, a driver's license or a credit card. In each instance, the method used in verifying the identity of the customer shall be recorded on the report.

This regulation contains two requirements which are relevant to this case. First, it requires a financial institution, in filing a CTR, to verify and record the name of the individual *presenting* the transaction. It is undisputed that Ayala failed to record the name and address of the individuals who actually appeared before her and presented or conducted the transaction. The evidence showed that on June 1, 1983 Ayala handled a cash transaction between Elkin Estrada and Waldyr Pizzotti involving $105,000. The CTR covering this transaction stated in Part I that Ada Bottesini, residing at 4 Williamsburg in Irvine, California, conducted the June 1 transaction.[3] Such actions by a bank officer would appear to be illegal. *See United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979); *United States v. Puerto*, 730 F.2d 629 (11th Cir. 1984); *United States v. Sans*, 731 F.2d 1521 (11th Cir. 1984).

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[3] All of the evidence indicates that Ada Bottesini in fact resided abroad, so that even if it were arguably truthful to have incorporated the disclosure in Part I in Part II, that information was inaccurate.

The second material requirement of section 103.26 requires a financial institution to record the identity of any person for whose or which account a transaction is being effected. Part II, which asks for the individual or organization for whom the transaction was completed (if different from Part I), was not filled in in this case. It is this requirement that was called into question by the Ninth Circuit in *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987). In *Murphy*, defendant depositors attempted to launder money provided to them by undercover IRS agents by making it appear as though the money they were depositing came from the sale of shares of stock of a sham corporation set-up in the Northern Mariana Islands. The true source of the funds was the IRS agents; yet when defendants completed a CTR describing the deposit as having been made for the sham corporation's account, they were indicted for conspiracy to conceal and falsify material facts within the jurisdiction of the IRS and conspiring to defraud the IRS in its collection of data in violation of 18 U.S.C. § 371. The district court dismissed the indictment and the appellate court affirmed. In affirming the district court's dismissal, the Ninth Circuit found that defendants had truthfully completed the CTR form and that neither the Act itself nor the regulations imposed a duty on depositors to report the source of funds.

Ayala argues that *Murphy* applies to counts three and nine since the same Form 4789 was used and since under *Murphy* there can be no criminal wrongdoing in describing Ada Bottesina as the account holder on the CTR.

She further argues that Part I of Form 4789 is ambiguous since instead of explicity [*sic*] calling for information regarding the person who actually presented the transaction, it calls for information about the person who "conducted" the transaction.

The government argues that Ayala violated the implementing regulations in several ways; and that

Murphy does not apply to this case because it involved defendants who were only bank depositors, whereas Ayala was a bank officer. *See, e.g., Murphy*, 809 F.2d at 1431 ("[s]ection 5313 and its regulations do not clearly require *depositors* to identify the source of their funds") (emphasis added); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986), which by way of contrast discussed the case of *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979), noting that:

> While Thompson was a bank officer who breached the reporting duties imposed upon him by reason of his employment, the defendants in our case were not bound by any such duty.

Although the issue is difficult, the Court is not persuaded that *Murphy* applies to require a new trial or acquittal. It was handed down after trial in this case and would therefore have to be given retroactive effect to invalidate the jury's verdict. *Murphy* itself arose on a pre-trial motion to dismiss the Indictment; no similar procedure was invoked here, no objection to any of the pertinent instructions was made, and the evidence supports a finding that the statute is not ambiguous in its application to this case. *See United States v. So*, 755 F.2d 1350, 1355 (9th Cir. 1985). *Murphy* pertained to *a depositor*, not a bank official, as here. The regulations specifically govern banking institutions, not depositors. The charges were not limited to Part II, nor was the Indictment in this case limited to the collection of information with regard to currency transactions; it included a conspiracy to defraud the IRS in its revenue collection function. A number of cases make clear that a bank officer or employee can be found guilty of a crime for violating the Reporting Act and its attendant regulations. *See United States v. Sans*, 731 F.2d 1521 (11th Cir. 1984) (affirming conviction where evidence "was plainly adequate to support a conclusion that the bankers

failed to file CTR's with specific intent to violate the reporting laws"); *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979) (affirming conviction of Chairman of Board of bank for failing to file a CTR); *United States v. Puerto*, 730 F.2d 627 (11th Cir. 1984) (affirming conviction of bank teller for violation of currency reporting laws). *See also, United States v. Tobon-Builes*, 706 F.2d 1092, 1098-99 (11th Cir. 1983) ("the *Thompson* court made clear that the defendant's liability, like Tobon's liability here, stemmed not from his duty to file a currency report but rather from his causing the financial institutions to fail to file the required report").

No argument was made nor was any evidence adduced that would indicate Ayala did not understand any of the disclosure requirements. Regardless, there is no ambiguity as to Part I, which on its face requires identification of the person who *conducted* the transaction. Moreover, the implementing regulation explicitly states that "a financial institution shall verify and record the name and address of the individual presenting a transaction . . ." 31 C.F.R. § 103.26.

Thus, even assuming there may in some circumstances be vagueness in the requirement to report the source of funds (Part II), Ayala never raised the issue in any manner during any part of the trial proceeding. Thus, unless it was plain error to allow the government to go forward on its theory of the case, prior to any decisions indicating that one part of the CTR could be impermissibly vague, the Court cannot grant a new trial. *See United States v. Jones*, 404 F. Supp. 529 (E.D. Pa. 1975) (rejecting defendant's post-trial objection to witness' assertion of privilege against self incrimination and stating "[i]n the absence of plain error, matters not called to the attention of the trial judge cannot be subsequently raised in the post trial stages of this proceeding"); *United States v. Schreiber*, 599 F.2d 534 (3rd Cir.

1979) (a litigant cannot obtain a new trial because of alleged errors to which he assented during the first trial).

D. SUFFICIENCY OF THE INDICTMENT

Although generally an indictment may not be amended, 1 Wright and Miller, *Federal Practice and Procedure*, § 127, the rule refers to matters of substance and does not bar a change that is "merely a matter of form." *Russell v. U.S.*, 369 U.S. 749, 770 (1962). In addition, a portion of an indictment that the evidence does not support may be withdrawn from the jury without violating the rule against amendment provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense. *Salinger v. U.S.*, 272 U.S. 542, 548-9 (1932); *United States v. Dawson*, 516 F.2d 796, 801 (9th Cir. 1975). "The erroneous amendment of one count does not destroy other counts of the indictment nor invalidate the judgment of conviction thereon, nor does it affect the validity of the conviction of defendants not concerned with the amendment, in the absence of a showing of prejudice." 1 Wright and Miller at § 127.

In the instant action, defense counsel in open court, with Ayala present, stipulated to removal of count ten and the overt acts relating to count ten were deleted from the conspiracy count, along with object (d) of the conspiracy. Such deletion does not require reindictment. *U.S. v. Kuna*, 760 F.2d 813 (7th Cir. 1985) (narrowing of indictment does not constitute amendment which renders indictment void). Although it might be preferrable for the dismissal to be approved with a formal order signed by the Court, *Haggard v. U.S.*, 369 F.2d 968 (8th Cir. 1966), no prejudice has been shown and thus no grounds for ordering a new trial exist. *U.S. v. Cook*, 745 F.2d 1311 (10th Cir. 1984) (prejudice to defendant must be found before an amendment to indictment will be held

impermissible); *see also United States v. Burnett*, 582 F.2d 437 (8th Cir. 1976).

E. VALIDITY OF JURY INSTRUCTIONS

To determine if a challenged jury instruction was adequate, the appellate court examines the district court's instructions as a whole. *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983). The trial judge is given substantial latitude in tailoring the instructions and a challenge that pertains to the trial judge's language or formulation of the charge is therefore reviewed only for an abuse of discretion. *United States v. Wright*, 742 F.2d 1215, 1221-2 (9th Cir. 1984). Where no objection is made at trial to the giving of an instruction, defendant must show that the instruction resulted in constitutional error justifying a new trial. *See U.S. ex rel. Annunziato v. Manson*, 425 F. Supp. 1272 (D.C. Conn.) (refusal to give instruction was not a constitutional error requiring new trial). Likewise, where defendant has failed to object, reversal is unjustified in the absence of a showing of plain error. *United [sic] v. Wright*, 742 F.2d 1215, 1222 (9th Cir. 1984).

1. AYALA'S DUTIES TO FILL OUT CTR'S

No objections were made to the Court's instructions on currency transaction reporting; thus, defendant must show that the instructions given resulted in constitutional error justifying a new trial or plain error requiring reversal. *United States v. Wright*, 742 F.2d 1215 (9th Cir. 1984).

Defendant claims that an instruction should have been given to the jury describing Mrs. Ayala's specific duties in filling out CTRs at the Bank of America Santa Ana branch. Whether she had any such duty was the subject

of testimony at trial; and it was appropriate for the jury to decide on such evidence whether she had the requisite intent and knowledge to cause the bank to file a materially inaccurate report. *See Tobon-Builes*, 706 F.2d 1092, 1098-99, and *Thompson*. Accordingly, there was no error in failing to supply the jury with the office duties of Ayala at the Bank of America.

2. POWER OF ATTORNEY AND AIDING AND ABETTING.

The defendant submitted a proposed instruction containing the Black's Law definition of a power of attorney. In light of the Bank requirements that its own power of attorney form had to be on file and that no such power of attorney form was on file in this case, the instruction sought by defendant lacked foundation and would have been confusing. No authority was offered in support of the instruction, which was submitted at the last minute. Moreover, the mere fact that this instruction pertained to defendant's theory of her case does not compel the court to give it, unless it is otherwise proper. *United States v. Silverman*, 745 F.2d 1386, 1399 (11th Cir. 1984).

Defendant also argues that the Court's instructions on aiding and abetting (p. 47 of instructions) were confusing since they did not state the need to establish the actus reas and mens rea of the underlying crime. Defendant urges that "unless the principals had the requisite intent and committed an illegal act, the aiding and abetting charge fails." (Def's Motion at 15) (citing *United States v. Mann*, 811 F.2d 495 (9th Cir. 1987).) In addition, defendant claims instructions given on page 47 and 48 failed to clarify that an omission to act must be coupled with a duty to act in order to be criminally culpable. "Ayala could have been convicted of aiding

and abetting by doing nothing under these erroneous instructions." (Def's Brief at 16).

The instructions must be taken as a whole. *Wright*, 742 F.2d at 1221. The instructions on page 47 clearly required the jury to find that defendant had to have knowledge that she was aiding Gamboa and Estrada conceal material facts from the IRS and intent to so aid and abet. On the other hand it is correct that usually the government must prove that someone committed the underlying crime and that the principal must be shown to have the essential criminal intent. *Mann*, 811 F.2d at 497; *United States v. Tashjian*, 660 F.2d 829, 842 (1st Cir. 1981). Even though the specific instruction on page 47 did not include these elements, this did not amount to error and did not prejudice Ayala's rights. *Cf. United States v. Herzog*, 632 F.2d 469 (5th Cir. 1980) (holding that court's failure to identify employee status as essential element of the offense of willfully supplying false or fradulent income tax withholding exemption statements to employer did not amount to reversible plain error). Under applicable Ninth Circuit law, a person may be punishable under the aiding and abetting statute, 18 U.S.C. § 2, for willfully causing an act to be done which if directly performed by him or another would be an offense against the United States. *United States v. Vaughn*, 797 F.2d 1485, 1490-1 (9th Cir. 1986).

3. THE JEWEL INSTRUCTION

Defendant argues that giving of the "Jewell instruction" was error. This instruction pertained only to Count 9 and is modeled after the Ninth Circuit Model Jury Instruction No. 5.09 (Deliberate Ignorance) *See Manual of Model Jury Instructions For the Ninth Circuit*, § 5.09 (1985 Ed.) The Comment to section 5.09 states that this instruction "should not be given in every case where a defendant claims a lack of knowledge; rather, it is

appropriate only in those comparatively rare cases where, in addition, there are facts which suggest deliberate ignorance. *United States v. Murrietta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977; *accord United States v. Erwin*, 625 F.2d 838, 841 (9th Cir. 1980). If there is no evidence indicating that the defendant had a conscious purpose to avoid learning the truth, the instruction should not be given."

Defendant's case suggested that other bank employees were responsible for filing the CTRs. Accordingly, there are facts in evidence that support an inference of deliberate ignorance. *McAllister v. United States*, 747 F.2d 1273, 1275 (9th Cir. 1984). Defendant argues that it was prejudicial to give this instruction without informing the jury whose duty it was to actually file the CTR in connection with the June 1, 1983 transaction. However, Ayala may be guilty of knowingly causing a materially false CTR to be filed even without having an explicit duty to prepare the CTR.

F. NEWLY DISCOVERED EVIDENCE

Defendant offers several examples of new evidence which she claims justifies a grant of new trial. Five criteria must *all* be met to justify a new trial on the grounds of newly discovered evidence; "the evidence must be, in fact, newly discovered; the motion must allege facts from which the court can infer diligence on the part of the movant in attempting to secure the evidence; the evidence must be more than merely cumulative or impeaching; it must be material to the issues involved; and it must be such as, on a new trial, would probably produce an acquittal." *United States v. Kenny*, 645 F.2d 1323, 1343 (9th Cir. 1981). None of the new evidence presented by defendant satisfies all these criteria.

Defendant's first proffer of new evidence is information tending to show that Ayala did not need to launder money to meet her monetary performance goals at the bank. According to defendant, such evidence undermines the government's showing of Ayala's alleged motive. This evidence, which is not necessarily "new" and could have been pressented at trial, would not likely lead to acquittal at a new trial. The government presented evidence that Ayala had received gifts from her co-conspirator clients, a fact which itself may have motivated her to assist in their laundering scheme. Moreover, even assuming that Ayala did not need Gamboa's/Pizzotti's accounts to meet her performance targets, she might conceivably have been motivated not just to meet her targets but to far surpass them.

Ayala's second proffer of new evidence is a copy of a Department of Motor Vehicles complaint she allegedly filed against Gamboa in 1984. According to defendant, this evidence tends to show that Ayala was not a partner in crime with Gamboa, a man whom she attempted to bring to justice. This evidence also is not new; in fact, defendant admits that she testified about the complaint at trial. *See United States v. Prior*, 546 F.2d 1254 (5th Cir. 1977) (where government witness testified at trial concerning existence of letter, counsel's later post-trial production of letter did not qualify as newly discovered evidence). Thus, the only aspect of this evidence which is new is the copy of the complaint. Further, there was no reason that diligent defense work could not have produced the copy of the complaint at trial. *United States v. Dukes*, 727 F.2d 34 (2nd Cir. 1984). Defendant argues that this evidence would strengthen her credibility yet defendant's credibility was severely challenged by the government in many other areas that would remain unaffected by the evidence of the 1984 complaint.

Defendant's third proffer of new evidence involves translation of previously "unintelligible" portions of the September 19, 1985 tape recorded conversation of the meeting between defendant, Gamboa, and an undercover agent. Although Ayala claims that her new translation contains some previously unnoticed exculpatory statements by defendant, these statements in context are not substantially different and the tape contains damaging information which the new translation does not cure. Moreover, at best a new translation would weaken the government's showing of mens rea; yet other evidence tended to show this element as well. Thus, this new evidence is not likely to result in acquittal.

Finally, defendant offers new evidence impeaching one of the government's witnesses, Luis Gamboa. Such evidence cannot support a motion for new trial. *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983).

G. TESTIMONY OF SPECIAL AGENT NEWBROUGH

Defendant argues that the Court erroneously permitted IRS Agent Newbrough to invade the province of the jury through his opinion evidence on the ultimate issue of guilt and by allowing Newbrough to vouch for the government's witnesses. *See United States v. Brown*, 720 F.2d 1059 (9th Cir. 1984); *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980). This argument is unpersuasive. No challenge was made to Newbrough's qualifications as an expert nor were there any objections to his statements that are now alleged to have vouched inappropriately for government witnesses. Moreover, the spectrum of allowable testimony by government agents like Agent Newbrough is broad. *See United States v. Marchini*, 797 F.2d 759, 765-66 (9th Cir. 1986); *United Statees [sic] v. Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980) (allowing opinion testimony of an

IRS agent on the filing of fraudulent tax returns and stating that although "the opinion on the deductibility of the interest was intimately related to the question of Clardy's guilt or innocence, it was still admissible"). *See also United States v. McCollum*, 802 F.2d 344, 346 (9th Cir. 1986); *United States v. Fleishman*, 684 F.2d 1329, 1335 (9th Cir. 1982); *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979).

Dated: June 23, 1987

/s/ Pamela Ann Rymer
Pamela Ann Rymer
United States District Judge